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**IN THE  
COURT OF APPEALS OF INDIANA**

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CYNTHIA K. COBB,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 41A04-0510-CV-616
	)	
BRENT R. MCINTOSH, M.D.,	)	
	)	
Appellee-Defendant.	)	

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APPEAL FROM THE JOHNSON SUPERIOR COURT  
The Honorable Kevin M. Barton, Judge  
Cause No. 41D01-0503-MI-18

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**September 12, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Chief Judge**

Cynthia K. Cobb appeals the trial court's order granting summary judgment in favor of Dr. Brent R. McIntosh. She raises one issue, which we restate as whether the trial court erred when it found that there was no genuine issue of material fact regarding whether Cobb filed her medical malpractice complaint within the applicable statute of limitations.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Cobb first presented to Dr. McIntosh in November 1999 for treatment of pain that she was experiencing in both of her feet. On April 19, 2000, Dr. McIntosh performed surgery on Cobb's right foot to do a tarsal tunnel release<sup>1</sup> and a partial plantar release.<sup>2</sup> This surgery was successful. On July 20, 2000, Dr. McIntosh performed the same procedure on Cobb's left foot.

Cobb testified in her deposition that when she woke up from the second surgery, she immediately felt that something had gone wrong with the surgery because the pain in her left foot was intense. *Appellee's App.* at 43. Cobb continued to see Dr. McIntosh regarding the pain in her left foot after the surgery until March 20, 2001. In April of 2001, Cobb went to see Dr. Douglas Flory, and on August 24, 2001, she went to see Dr. Lynette Green-Mack, both regarding the continued pain in her left foot. Both of the doctors told Cobb that her complete plantar fascia had been released and that this was related to the surgery performed

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<sup>1</sup> A tarsal tunnel release is a surgical procedure to relieve "pressure exerted on the nerve within the tarsal tunnel." <http://medterms.com> (search for "tarsal tunnel syndrome"). The sensory nerve in the ankle passes through the tarsal tunnel. *Id.*

by Dr. McIntosh. *Id.* at 46. In her deposition, Cobb testified that she sued Dr. McIntosh based on the representations of Dr. Flory and Dr. Green-Mack. *Id.* at 45-46.

On March 18, 2003, Cobb filed her complaint against Dr. McIntosh with the Indiana Department of Insurance, alleging that Dr. McIntosh negligently performed the surgery on her left foot by completely releasing her plantar fascia. On March 9, 2005, Dr. McIntosh filed a Motion for Preliminary Determination of Law seeking summary judgment upon the issue of the medical malpractice statute of limitations. Dr. McIntosh filed a memorandum of law in support of this motion and designated evidence, which included Cobb's complaint, portions of her answers to interrogatories, and portions of her deposition. Cobb did not file a response to Dr. McIntosh's motion and did not designate any evidence. A hearing was held on Dr. McIntosh's motion on June 30, 2005, and on August 15, 2005, the trial court granted summary judgment in favor of Dr. McIntosh. On September 13, 2005, Cobb filed a motion to correct error, which was denied by the trial court. Cobb now appeals.

### **DISCUSSION AND DECISION**

"A motion for preliminary determination, when accompanied by evidentiary matters, is akin to a motion for summary judgment and is subject to the same standard of appellate review as any other summary judgment disposition." *Jacobs v. Manhart*, 770 N.E.2d 344, 348 (Ind. Ct. App. 2002), *trans. denied*. When reviewing a summary judgment determination, we apply the same standard as the trial court: summary judgment is only

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<sup>2</sup> The plantar fascia "is the long, flat band of tissue (ligament) that connects the heel bone to the toes and supports the arch of the foot." <http://www.webmd.com> (follow "Diseases & Conditions" hyperlink; then search for "plantar fasciitis"). A plantar fascia release is a surgical procedure that "involves cutting part of the plantar fascia ligament" in order to relieve the tension on the ligament and inflammation. *Id.*

appropriate where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000). We construe all facts and reasonable inferences drawn therefrom in favor of the non-moving party. *Id.* When the moving party asserts the statute of limitations as an affirmative defense, and establishes that the action was commenced beyond the statutory period, the burden shifts to the non-moving party to establish an issue of fact material to a theory that avoids the defense. *Jacobs*, 770 N.E.2d at 349.

Cobb argues that the trial court erred when it granted Dr. McIntosh's motion for summary judgment because Dr. McIntosh failed to meet his burden of proving that Cobb's medical malpractice claim was barred by the statute of limitations. She contends that the medical malpractice "occurrence-based" statute of limitations is unconstitutional as applied to her and that she should have had two years from the discovery of the alleged malpractice in order to file her claim.

The statute of limitations for medical malpractice claims states in pertinent part:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . . .

IC 34-18-7-1(b). This occurrence-based statute of limitations has been upheld as constitutional on its face under Article I, Sections 12 and 23 of the Indiana Constitution. *Langman v. Milos*, 765 N.E.2d 227, 234 (Ind. Ct. App. 2002), *trans. denied*. However, our Supreme Court has held that under some circumstances, the statute of limitation is

unconstitutional as applied to certain plaintiffs. See *Van Dusen v. Stotts*, 712 N.E.2d 491, 495 (Ind. 1999) (occurrence-based statute of limitations held to be unconstitutional as applied to plaintiff who suffered from a disease with a long latency period and injuries did not manifest themselves until after two-year limitations period); *Martin v. Richey*, 711 N.E.2d 1273, 1285 (Ind. 1999) (medical malpractice statute of limitations held to be unconstitutional as applied to plaintiff who suffered from cancer and injury did not manifest until after the two-year period expired). The statute requires a medical malpractice claim to be filed within two years of the alleged negligent act and has been upheld as constitutional to all plaintiffs who are able to discover the alleged malpractice within two years from the occurrence. *Langman*, 765 N.E.2d at 234.

The first step in analyzing our medical malpractice statute of limitations as applied to Cobb's claim is to determine when the alleged malpractice occurred and thus, when the two-year period expired. *Jacobs*, 770 N.E.2d at 352. The surgery on Cobb's left foot occurred on July 20, 2000, and therefore, the two-year statutory period ended on July 20, 2002. The next step is to determine the discovery date, the date when Cobb discovered the alleged malpractice and resulting injury or possessed enough information that would have led a reasonably diligent person to make such discovery. *Id.* If the discovery date is determined to fall within the two-year statute of limitations, then a third step must be applied to determine whether the time that remains of the limitations period is reasonable and renders the occurrence-based statute of limitations constitutional as applied. *Id.* However, if we determine that the discovery date was after the expiration of the statute of limitations, then

the statutory period is unconstitutional as applied to Cobb's claim. *Id.* Under those circumstances, Cobb would have a full two years after the discovery date to file her claim.

Cobb testified in her deposition that immediately after the surgery, she thought that something had gone wrong with the surgery. *Appellee's App.* at 43. In April of 2001, Cobb was examined by Dr. Flory, and on August 24, 2001, she was seen by Dr. Green-Mack. Both of these doctors notified Cobb that there had been a complete release of the plantar fascia in her left foot and that it was related to the surgery done by Dr. McIntosh. Cobb knew that only a partial release of the plantar fascia was to have been done during her surgery. She testified that it "was shocking to hear" that a complete plantar fascia release had been done. *Id.* at 47. This information given to Cobb by Dr. Flory and Dr. Green-Mack was enough information to lead a reasonably diligent person to discover the alleged malpractice claim against Dr. McIntosh. We conclude that the latest possible date of discovery for Cobb was August 24, 2001.

This date was within the two-year statute of limitations and approximately eleven months before it expired. We must now determine if Cobb's claim could reasonably be asserted in the eleven months before the limitations period expired. In *Boggs*, our Supreme Court held that as long as the statute of limitations does not unreasonably shorten the window of time in which to file a claim after the discovery date such that it is impractical for a plaintiff to file a claim at all, it is constitutional as applied to the plaintiff. 730 N.E.2d at 697. In that case, an eleven-month window was held to be a reasonable amount of time in which to file the plaintiffs' malpractice claim. *Id.* We therefore conclude that Cobb had a reasonable amount of time after she discovered the alleged malpractice in which to file her

claim against Dr. McIntosh, and enforcement of the two-year occurrence-based statute of limitations did not unreasonably shorten the window of time available such that it was impractical for her to file her claim. The trial court did not err in granting summary judgment in favor of Dr. McIntosh.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.